IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

*Petitioners,*

—against—

TRANSOCEAN AIR LINES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONERS

ROBERT F. NOLAN and MARJORY M. HALL

by

SPEISER, QUINN & O'BRIEN

*Attorneys for Petitioners*

STUART M. SPEISER
EDWARD M. O'BRIEN
ROBERT A. DWYER
HARRY S. WENDER
2026 Eye Street, N.W.
Washington 6, D. C.

*Of Counsel*

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Basis of Jurisdiction | 1 |
| Constitutional Provisions | 2 |
| Statutes | 2 |
| Rules | 4 |
| Questions Presented | 4 |
| Statement of the Case | 5 |
| Summary of Argument | 8 |
| ARGUMENT: | |
| I. The Court below, in holding that petitioners would be barred from bringing this action in in the Courts of California, decided this question in a way that is in conflict with local California decisions and Rule 17(b) of the Rules of Civil Procedure. | 9 |
| A. The Court Below Is in Error in Deciding That a California Court Would Not Look to the Law of Petitioners' Domicile to Determine the Age at Which Petitioner Was No Longer Under a Disability to Sue | 11 |
| B. The Court Below, in Applying the Law of California to Determine Petitioners' Capacity to Sue, Ignored Its Own Rule 17(b) That the Party's Capacity to Sue Should Be Determined by the Law of the Domicile of the Party | 19 |

PAGE

II. The Court below conflicted with decisions of this Court and with decisions of the local courts in barring the action of the infant daughter herein ..... 22

III. Section 13 of the New York Civil Practice Act has been so construed and applied herein by the Court below as to violate petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution ..... 26

CONCLUSION ..... 29

PRAYER ..... 29

## TABLE OF CASES CITED

*American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (C. A. 2d, 1955) ..... 10

*Anglo Calif. Nat. Bk.* v. *Klein*, 162 Misc. 898, 296 N. Y. Supp. 191 ..... 10

*Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) ..... 25

*Bouton* v. *Villaria*, 138 C. A. 2d 642, 292 P. 2d 638 (1956) 15

*Bowen* v. *Kirjinian*, 105 Cal. App. 286, 287 Pac. 570 (1930) ..... 23, 25

*Bowler* v. *Roos*, 213 Cal. 484, 2 P. 2d 817 (1931) ..... 23, 24, 25

*Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553 (1920) ..... 27

*Caraway* v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956) ..... 21

*Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142 (1907) ..... 27

*Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208 ..... 20

PAGE

*Deason* v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025 (1935) ..... 11, 14, 19

*Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955) ..... 11, 12, 14, 19, 22

*Erie R.R. Co.* v. *Tompkins*, 304 U. S. 62 (1938) ..... 9, 16, 20

*Flores* v. *Brown*, 39 Cal. 2d 622, 248 P. 2d 922 (1952) ..... 24, 25

*Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945) ..... 9, 20

*Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921) 10

*Haro* v. *Southern Pac. R. Co.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936) ..... 23, 24

*Hartigan* v. *Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851 (1890) ..... 22

*Isenberg* v. *Rainier*, 70 Misc. 498, 127 N. Y. Supp. 411, aff'd 145 App. Div. 256 ..... 10

*Janes* v. *Sackman*, 177 F. 2d 928 (C. A. 2d, 1949) ..... 27

*Kinnier* v. *Kinnier*, 45 N. Y. 535 ..... 15

*Kiaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941) ..... 9

*Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917) ..... 10, 26

*Matter of Honeyman*, 117 Misc. 653, 192 N. Y. Supp. 910, aff'd 202 App. Div. 728, 193 N. Y. Supp. 936 (1922) ..... 15

*McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230 (1934) ..... 27

*Meredeth* v. *Winter Haven*, 320 U. S. 228 (1943) ..... 17, 25

*Mertz* v. *Mertz*, 271 N. Y. 466, 3 N. E. 2d 597 (1936) ..... 20

*Miles* v. *Illinois C. R. Co.*, 315 U. S. 698 (1942) ..... 27

*Miller* v. *Miller*, 91 N. Y. 315 ..... 15

PAGE

*New York Evening Post* v. *Chaloner*, 265 Fed. 204 (C. A. 2d, 1920) ..... 20
*Palmer* v. *Hoffman*, 318 U. S. 109 ..... 20
*Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 977 (1956) ..... 24, 25
*Petition of Altman*, 138 N. Y. S. 2d 336 (1954) ..... 15

*Rabe* v. *Western Union Tel. Co.*, 198 Cal. 290, 244 Pac. 1077 (1926) ..... 23
*Ragan* v. *Merchants Transfer & Warehouse Co.*, 377 U. S. 530 ..... 21
*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1938) 16

*Salmon* v. *Rathjens*, 152 Cal. 290, 92 Pac. 733 ..... 25
*Sears* v. *Majors*, 104 Cal. App. 60, 285 Pac. 321 (1930) ..... 21, 22, 23, 24, 25
*Six Companies* v. *Joint Highway Dist. No. 13*, 311 U. S. 180 (1940) ..... 17
*Sun Oil Co.* v. *Guidry* (La.), 99 So. 2d 424 (1958) ..... 15

*Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920) ..... 27

*West* v. *American Tel. & Tel. Co.*, 311 U. S. 233 (1940) ..... 17, 20, 25
*Wohlgemuth* v. *Meyer*, 193 C. A. 2d 326, 293 P. 2d 816 (1956) ..... 25
*Woods* v. *Interstate Realty Co.*, 337 U. S. 535 ..... 21

CONSTITUTION

United States Constitution, Article IV, §2 ..... 2, 5, 8, 27

STATUTES

California Code of Civil Procedure, §377 ..... 2, 5, 22
California Code of Civil Procedure, §340(3) ..... 3, 7

PAGE

California Code of Civil Procedure, §352 .....3, 7, 11
California Civil Code, §25 .....3, 7, 14

New York Civil Practice Act, §13 .....3, 4, 5, 7, 8, 10, 26, 27
New York Civil Practice Act, §60 ..... 27
New York Civil Practice Act, §§201-06 ..... 28
New York Civil Practice Act, §236 ..... 27

South Carolina Code, Vol. 1, §10-104(1) ..... 27

## Rules

Rule 17(b), Federal Rules of Civil Procedure ....4, 9, 19, 21

## Authorities

Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 ..... 13

Clark, *Procedural Aspects of the New State Independence*, 8 Geo. Wash. L. Rev. 1230 ..... 21

Comment, 9 Cath. U. of Am. L. Rev. 52 ..... 14

15 C. J. S., Conflict of Laws, §14b ..... 18

43 C. J. S., Infants, §20 ..... 18

Cook, *Logical and Legal Bases of the Conflict of Laws*, 248, 250, 345 (1949) .....13-14, 18

Currie and Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 Yale L. J. 1323 (July 1960) ..... 28

Ehrenzweig, *Parental Immunity in the Conflict of Laws*, 23 U. of Chi. L. Rev. 474 ..... 13

Kurland, *Justice Frankfurter and the Erie Doctrine*, 67 Yale L. J. 187 (1959) ..... 25

PAGE

Moore's Commentary on the U. S. Judicial Code, 307-59 (1949) ..... 21

Note, 57 Mich. L. Rev. 901 (1959) ..... 14

Rabel, *Conflict of Laws, A Comparative Study;* 322 (1945) ..... 13

1943; Report N. Y. Law Revision Commission, 134, 149-53 ..... 10

Shoenbach, *Capacity of Minors and the Conflict of Laws,* 17 Boston U. L. Rev. 623 ..... 18

Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes,* 32 Rocky Mt. L. Rev. 287, 307-10 (1960) ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

---

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

*Petitioners,*

—against—

TRANSOCEAN AIR LINES,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR THE PETITIONERS

---

### Opinions Below

The opinion of the District Court is reported in 173 F. Supp. 114. The opinion of the Court of Appeals is reported in 276 F. 2d 280.

### Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254. Petition for Writ of Certiorari was granted by this Court on June 27, 1960.

## Constitutional Provisions, Statutes and Rules Involved

### Constitution

Article IV, §2, of the Constitution of the United States of America provides:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

### Statutes

Section 377 of the California Code of Civil Procedure provides in pertinent part, as follows:

> When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death . . . In every action under this section, such damages may be given as, under all the circumstances of the case, may be just . . . The respective rights of the heirs in any award shall be determined by the court . . .

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply . . .

Section 340 of the California Code of Civil Procedure provides in pertinent part:

> TIME OF COMMENCING CIVIL ACTIONS
>
> §340. Within one year:
>
> * * * * *
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another . . .

Section 352 of the California Code of Civil Procedure provides insofar as relevant to this case:

> If a person entitled to bring an action . . . be, at the time the cause of action accrued, either:
>
> 1. Within the age of majority; . . .
>
> —The time of such disability is not part of the time limited for the commencement of the action.

Section 25 of the California Code provides in pertinent part as follows:

> Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or trans-

action respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age.*

## Rule

Rule 17(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile . . .

## Questions Presented

1. Do applicable California decisions and the provisions of Rule 17(b) of the Federal Rules of Civil Procedure require the Federal District Court sitting in New York to apply the law of the domicile of the petitioner-widow herein in determining the age at which the widow's disabilities of minority ceased for purposes of tolling the California Statute of Limitations as "borrowed" by Section 13 of the New York Civil Practice Act?

2. Should not the Court of Appeals and the District Court have refused to follow two old decisions of the California Court holding that if the widow is barred from bringing a wrongful death action by reason of the statute of limitations then the infant child is also barred, since the action is deemed joint, where recent decisions of the same Court have permitted the remaining heirs to bring the action although one of the heirs is barred by reason of

---

* As worded on March 23, 1953, the date of decedent's death. Subsequently, Section was amended so as to apply to both sexes. Petitioners do not claim that the amendment has any material bearing on the issues herein.

contributory negligence, on the ground that the action is joint only in the sense there cannot be a series of suits by each heir?

3. Does not the construction of Section 13 of the New York Civil Practice Act by the District Court and the Court of Appeals herein abridge the petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution, since, as so construed, the petitioners, because of their non-residence have been given no access to the courts of New York in their own name, whereas a resident of New York, under similar circumstances, would have had such access?

## Statement of the Case

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant (App. 3-6). The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as Guardian *ad Litem* of her minor child (App. 2, 8, 9). Jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a citizen of New York, the widow and her minor child being citizens of South Carolina and the defendant being a California corporation (App. 4). The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, §377 (App. 6, 7).

The defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of the California Statute of Limitations by the "borrowing" provision of the New York Statute of Limitations, Section 13 of the New York Civil Practice Act (App.

17). The District Court granted the motion (App. 39). Upon appeal, the Court of Appeals unanimously affirmed.

The undisputed facts in this case may be summarized as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936 (App. 25)

2. The marriage of decedent to the widow took place on December 26, 1951 (App. 25).

3. Judith Marie Hall, the child of the couple, was born December 2, 1952 (App. 25).

4. The death of decedent took place on March 20, 1953 (App. 6, 25).

5. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957 (App. 25).

6. The administrator was appointed on February 18, 1958 (App. 3, 4).

7. The action was commenced in the District Court on November 7, 1958 (App. 25).

8. The widow and child were and are citizens and residents of South Carolina (App. 8, 9).

9. The administrator was and is a citizen of New York (App. 3, 4).

10. The defendant was and is a California Corporation (App. 4).

The reasoning of the District Court may be summarized as follows:

1. Section 13 of the New York Civil Practice Act requires the District Court to apply the California Statute of Limitations and "all its accouterments" including the provisions tolling the statute during minority.

2. Under California law, a wrongful death action must be commenced within one year from decedent's death (California Code of Civil Procedure, §340(3)).

3. The Statute of Limitations is tolled during the minority of the person entitled to sue (California Code of Civil Procedure, §352).

4. However, a woman who lawfully marries prior to the age of 18, attains her majority upon reaching that age (California Civil Code, §25).

5. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority.

6. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent.

7. For similar reasons, the causes of action of the administrator herein would also appear to be barred.

The District Court concluded from the foregoing that under California law, which was incorporation herein by virtue of Section 13 of the New York Civil Practice Act, all the causes of action herein were time-barred on November 17, 1955, since the widow attained her majority on November 17, 1954, when she became 18 years of age.

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) Under the conflict of laws rule of

both New York and California, and also under Rule 17(b) of the Federal Rules of Civil Procedure, the District Court should have determined the minority status of the widow by the law of her domicile, South Carolina, which extends her minority to age 21; (2) that in view of recent decisions of the California Court, California would no longer bar the action on behalf of the infant daughter simply because the widowed mother was barred, and (3) that the Court's construction of Section 13 of the New York Civil Practice Act, in effect, abridged the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, in that she never had an opportunity to sue in the New York Courts in her own name by reason of her nonresidence.

The Court of Appeals, in affirming, held that since there was no controlling decision in point, it felt that the better rule would be to apply the law of the borrowed forum, California, not the law of the domicile, South Carolina, as to the minority status of the widow; that the widow's privileges and immunities were not abridged, since she could have sued in New York by a Guardian *ad Litem;* and that in barring the infant child the District Court "was surely right in thinking the New York Courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with, but in no way reflect on the pertinent authorities."

## Summary of Argument

I. The Court below should have applied the law of the petitioner-widow's domicile in determining the termination of her minority status and the commencement of her capacity to sue. The Court below erred in applying the law of the borrowed forum, California, since local California

decisions indicate that California courts would have applied the *lex loci domicilii* under the circumstances of this case. Furthermore, even assuming as the Court below did, that there were no helpful decisions in California on this question, the Court below erred in refusing to give effect to Rule 17(b) and in applying a conflicting rule.

II. The Court below erred in blindly following two old decisions in California to bar the petitioner-daughter, when more recent decisions clearly show that these cases would not be followed today.

III. The Court below in construing Section 13, so as to bar the petitioner-infants before they attained capacity to sue in either the Federal or State Courts of New York, has deprived petitioners of their privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution.

## ARGUMENT

**The Court below, in holding that petitioners would be barred from bringing this action in the Courts of California, decided this question in a way that is in conflict with local California decisions and Rule 17(b) of the Rules of Civil Procedure.**

Since the jurisdiction of the District Court is based upon diversity of citizenship, it must apply the "substantive" law of New York, including its conflict of laws, and its statute of limitations. *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 62 (1938); *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945).

In this case, since the action arose in California and is brought on behalf of nonresidents of New York, the applicable conflicts rule with respect to the statute of limitations is contained in Section 13 of the New York Civil Practice Act, a so-called "borrowing statute". Section 13 provides in pertinent part that an action on behalf of a nonresident cannot be brought in a court of New York "... after the expiration of the time limited by the laws either of this state or of the state or county where the cause of action arose."

It is well-settled in New York that in determining the "expiration of the time limited by the laws ... of the state ... where the cause of action arose", the New York Court will look to the whole law of the other state and not just its statute of limitations. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (C. A. 2d 1955); *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 560; *Isenberg* v. *Rainier*, 70 Misc. 498, 127 N. Y. S. 411, aff'd 145 App. Div. 256. And see *1943, Report N. Y. Law Revision Commission*, 134, 149-153. This construction appears to be in accord with the majority of states having similar statutes. Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 Rocky Mt. L. Rev. 287, 307-310. As summarized by Mr. Justice Shientag, in *Anglo Calif. Nat. Bank of San Francisco* v. *Klein*, 162 Misc. 898, 906, 296 N. Y. Supp. 191, 196 (1936), "The purpose of Section 13 is to provide that no one can be sued in New York by a nonresident, if at the time he could not be sued in the State where the cause of action arose ..."[1]

[1] See, *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921) (application of Maryland absence provision); *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917) (application of Missouri extension provision in consequence of death); *Anglo-California Nat. Bank* v. *Klein*, *supra* (application of California law to effectuate waiver of statute of limitations, although invalid in New York).

Thus, in the instant case, the Federal Court was presented with this basic question: Would petitioners have been held barred by a California Court if petitioner had brought suit there instead of here? And the determination of that question is dependent upon whether California would apply its own law or would apply the law of petitioner's domicile to determine the age at which she was no longer under a disability to sue for purposes of the California tolling provisions.

**A. The Court Below Is in Error in Deciding That a California Court Would Not Look to the Law of Petitioners' Domicile to Determine the Age at Which Petitioner Was No Longer Under a Disability to Sue.**

The California tolling provision (C. C. P. §352) provides that if a person be "within the age of majority . . . the time of such disability is not a part of the time limited for the commencement of the action." Petitioners urged to the Court below that in determining the period of "such disability" the law of the widow's domicile, not the law of California, would be looked to by the California Courts under their own choice of law rule and cited two cases in support, *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 P. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955). However, the Court below chose to ignore the clear implications of these cases and, in effect, applied the rule of *lex loci actus*,[2] although petitioners had no contacts with California and the only connecting link was the entirely fortuitous and irrelevant fact that the aircraft in which deceased was riding happened to crash on California soil.

[2] The opinion of the Court below is not entirely clear on this point. The Court also appears to apply the so-called "gravity" test, the law of the forum, and, by analogy, the law of the *situs*.

In *Emery v. Emery, supra,* the California Supreme Court had before it a choice of law problem in which it expressly applied the law of the domicile to determine a question of disabilities or capacity to sue. In that case, Mrs. Emery and her two daughters, residents of California, sued Mr. Emery and his son in California for injuries they had suffered in Idaho in a car driven by the Emery son. Concededly, the substantive law of Idaho applied. Under Idaho law, the father and brother were immune from liability, but under California law they were not. Thus, there was presented to the California Supreme Court the basic question, should the law of the domicile or the law of the place of injury be applied to determine the question of capacity to sue and be sued? In choosing the law of the domicile, Mr. Justice Traynor, speaking for a unanimous court, left no doubt as to the rule California elected to follow (at pp. 427, 428):

"... This choice of law problem is one of first impression in this state. The possible choices in cases like the present one are three: The law of the place where the injury occurred, the law of the forum, and the law of the state in which the family is domiciled. We are aware of only two reported cases on the precise question presented. In *Ball* v. *Ball,* ——Wyo. —— [269 P. 2d 302, 304], the Supreme Court of Wyoming applied the law of the place (Montana) where the injury occurred to determine this question. *It is not, however, a question of tort but one of capacity to sue and be sued and as to that question the place of injury is both fortuitous and irrelevant.* In *Fowlkes* v. *Ray-O-Vac,* 52 Ga. App. 338, 340 [183 S. E. 210], the Court of Appeals of Georgia held that in actions between a minor child and its parents the 'law of the forum governs as to the parties and the right to sue.' In a somewhat analogous situation, many courts have held in

tort actions between husbands and wives that questions of capacity to sue and be sued should be governed by the law of the forum. (See Ford, Interspousal Liability for Automobile Accidents in the Conflict of Laws, 15 U. Pitt. L. Rev. 397, 419, and cases cited.) It should be noted, however, that in many of these cases, as in *Fowlkes* v. *Ray-O-Vac, supra,* the state of the forum was also the state of the domicile. Although tort actions between members of the same family will ordinarily be brought in the state of the family domicile, the courts of another state will in some cases be a more convenient forum, and thus the question arises whether the choice of law rule should be expressed in terms of the law of the forum or that of the domicile. *We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile.* That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist."[3] (Emphasis supplied.)

---

[3] This position is supported by eminent authority. Cheatham and Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 974-75 (1952); Ehrenzweig, Parental Immunity in the Conflict of Laws, 23 U. of Chi. L. Rev. 474-79 (1956). And see, Rabel, Conflict of Laws, a Comparative Study, 322 (1945); Cook, Logical and Legal

The holding in the *Emery* case was foreshadowed in *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 1025 (1935) in which an intermediate appellate court of California had before it a minor's contract to purchase land in California which the defendant minor sought to disaffirm on the ground of infancy. Prior to becoming a citizen of California, he was resident in the state of Oklahoma and there obtained a court decree conferring upon him: "the rights of majority concerning contracts" and authorizing and empowering him "to transact business in general with the same effect as if such business were transacted by a person over the age of majority". He was then nineteen years of age. Thereafter, he became a citizen of California, but before attaining the age of twenty-one entered into the contract in issue. In holding that the defense of infancy was good, the Court pointed out that the Oklahoma decree did not give the infant a legal status of majority and did not purport to do so but only conferred upon him a personal privilege effective only within Oklahoma, and, therefore, did not require California to give it full faith and credit except as it might relate to an Oklahoma transaction. The Court then applied the *lex loci domicilii*, the law of California, in the following language (at p. 484):

> "... The status of all persons within a state is exclusively a matter for that state to determine for itself. (Kinnier v. Kinnier, 45 N. Y. 535 [6 Am. Rep. 132].) In the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to this

---

Basis of the Conflict of Laws, 250 (1942). See also, note, 57 Mich. L. Rev. 901 (1959); Comment, 9 Cath. U. of Am. L. Rev. 52, 57-60. It should be noted that the removal of the disability to sue under Section 25 of the California Civil Code is based upon the most important family relationship of all, marriage.

contract which was made in this state, and the respondent had acquired no status which exempted him therefrom."

Petitioners are at a loss to explain how the court below found this case to be more favorable to the respondent herein. Although it might be argued that the case represents merely an application of the *lex loci contractus*, the citation of the *Kinnier* case[4] leaves no doubt that the court intended to and did apply the law of the domicile.

Both the District Court and the Court of Appeals seem to reject the domicile rule on the ground that a California Court would not apply the domicile law to give to a noncitizen a longer tolling period than would be available to its own citizens. Indeed, both Courts express this in their opinions.[5]

However, there is at least one reported case wherein a California Court did apply the domicile rule to give to a noncitizen an advantage it could not have extended to its own citizens.

In *Bouton* v. *Villaria*, 138 Cal. App. 2d 642, 292 P. 2d 638 (1956), a California appellate court reversed a judgment in favor of defendant on the ground that the trial court had improperly charged the California doctrine of imputed negligence. In that case, plaintiff was seeking damage for personal injuries sustained in an automobile

---

[4] *Kinnier* v. *Kinnier*, cited in the above opinion applied the *lex loci domicilii* to a marriage contract. See also, *Petition of Altman*, 138 N. Y. S. 2d 336 (1954) applying law of Israel to determine age at which infant could take possession of personalty located in New York; *Matter of Honeyman*, 117 Misc. 653, 192 N. Y. S. 910, aff'd 202 App. Div. 728, 193 N. Y. S. 936 (1922) applying law of Illinois; *Miller* v. *Miller*, 91 N. Y. 315, legitimacy.

[5] The constitutional aspects of this reasoning is treated hereinafter under Point III.

accident which occurred in California. Plaintiff, and her husband, who was driving the car in which she was riding, were citizens of Ontario, Canada. The appellate court noted that the law of California with respect to the imputation of the negligence of the husband to the wife was predicated upon the fact that in California the husband would have an interest in the wife's recovery. Therefore, the court reasoned that if, under the law of their domicile, Ontario, the husband would not have an interest in the recovery, then the reason for the California rule of imputed negligence did not exist. Looking to the domicile law the court found that under that law the husband did not have an interest in his wife's recovery, and, therefore, it was error to impute his negligence to his wife. The court, in its opinion, expressly conceded that if the husband and wife had been domiciled in California the result would have been different. This case clearly demonstrates that California would apply the *lex loci domicilii*, even though it would result in giving to a noncitizen an advantage that a citizen would not enjoy.

This court has admonished the Federal Courts since *Erie* v. *Tompkins, supra*, to search out and apply the local law, even though the Federal Court would favor some other rule. This obligation is not restricted merely to applying cases-in-point. The lack of a case-in-point does not give the Federal Court in a diversity case a license to search out and apply what it considers the majority rule or the better rule. Thus, Mr. Justice Reed, in a unanimous opinion written for this Court, observed in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 209 (1938):

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts

must now search for and apply the entire body of substantive law governing an identical situation in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include decisions of state courts, just as they would in a case tried in the state court, and just as they always have done in actions brought in the federal courts involving what were known as matters of 'local' law."

In *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940) Mr. Chief Justice Stone commented (at pp. 236-37):

"A state is not without law save as its highest court has declared it. *There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.* In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and *it is the duty of the former in every case to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear . . .*" (Emphasis supplied.)

Mr. Chief Justice Hughes, writing for a unanimous Court, in *Six Companies* v. *Joint Highway Dist. No. 13*, 311 U. S. 180 (1940), reversed a circuit court for disregarding what that court believed to be a dictum by a California appellate court, citing *West* v. *American Tel. & Tel. Co.*, *supra*. See also, *Meridith* v. *Winter Haven*, 320 U. S. 228, 237-38 (1943).

It is clear from the opinion of the Court below that it based its decision upon the erroneous premise that there was no relevant data or dicta in California to guide it and was at liberty, "despite general statements that matters of status are regulated by the law of the domicile", to apply what other courts "seem" to apply, i.e., the law of the forum. Aside from the question of the soundness or applicability of the cases and authority cited by the Court below for its position, the fact remains that the question before the Court was not what other courts might do, but what the California Courts would do, and on that question the Court below had clear authority in the California decisions for the domicile rule. There is nothing irrational, unreasonable or invalid in applying the *lex loci domicilii* to determine status and capacity. It is stated in *Corpus Juris Secundum* as the general rule,[6] and was followed in a recent case by the highest court of Louisiana. *Sun Oil Co.* v. *Guidry*, 99 So. 2d 424 (1958). This last cited case is directly in point. There the court was called upon to decide whether or not prescription had run against an infant domiciled in Texas on oil rights having a situs in Louisiana. In Louisiana prescription is tolled during the disability of infancy, which status continues until age twenty-one in Louisiana. In Texas, the infant had been completely emancipated by decree at age eighteen. Thus, the precise question presented was, as in the instant case, which law should be applied to determine the age at which the disabilities of infancy ceased? After a review of the cases and authority on the subject, the court applied the general rule that status

[6] 15 C. J. S., Conflict of Laws, §14b, pp. 907-08. See also, 43 C. J. S., Infants, §20, pp. 82-83. And see, Cook, The Logical and Legal Bases of the Conflict of Laws, 248, 345 (1949). At least one writer has concluded that there is no general rule, see, Schoenbach, Capacity of Minors and the Conflict of Laws, 17 Boston U. L. Rev. 623.

should be determined by the law of the domicile (Texas) and held, therefore, that disability ceased at age eighteen (at p. 428):

> "As we interpret the application of this rule to the present facts, the Texas decree fully emancipating Thornton at his domicile—a status recognized by Louisiana—is decisive that his personal status for purposes of Louisiana law is that of a fully emancipated minor."

Petitioners do not claim, nor is it necessary to a decision herein, that this conflicts problem is easily resolved or that the same result would be reached in all states and at all times, but petitioners do submit that all revelant data and dicta in California clearly mark the path which California would have followed as blazed in the *Emery* and *Deason* cases.

Although this court would give great weight to what the Court below, sitting in New York, would find to be the local New York law, it should be emphasized that the question herein involves California law. With all due respect to the Court below, it is submitted that the Court has not properly followed the rules of construction as laid down by this Court, which error can and should be corrected by this Court.

**B. The Court Below, in Applying the Law of California to Determine Petitioner's Capacity to Sue, Ignored Its Own Rule 17(b) That the Party's Capacity to Sue Should Be Determined by the Law of the Domicile of the Party.**

Rule 17(b), as far as here pertinent, has not been changed since it was originally promulgated as part of the Rules of Civil Procedure in 1938.

Prior to the Rules, the Federal Courts had no uniform civil procedural rules and, in general, followed the rules of practice and procedure of the local state courts. The coincidence of the *Erie* decision and the institution of the Federal rules within a few months of each other worked a revolution in diversity cases; what had been the rule in the *Swift* v. *Tyson* era, i.e., practice rules under local law and substantive common law rules under general Federal law, was reversed and substantive questions became matters of local law and procedural questions became a matter of Federal rules.

Prior to the Federal Rules and the *Erie* decision, the Federal Courts in New York applied the law of the forum to questions involving capacity of an individual to sue. *New York Evening Post* v. *Chaloner*, 265 F. 204 (C. C. A. 2d, 1920). This would seem to be in accord with local New York law, *Mertz* v. *Mertz*, 271 N. Y. 466, 474, 3 N. E. 2d 597 (1936). However, as promulgated by this Court, Rule 17(b) requires the Federal Courts to look to the law of the domicile to determine an individual's capacity to sue. It may be inferred that this Court felt this to be the better rule.

But what if there is a possible conflict between the Federal rules and the alleged local decisional law which would substantially affect the result? This question has been before this Court in one form or another on several occasions since the *Erie* decision and the sense of these decisions seems to be to discard the procedural-substantive dichotomy and to look to the result—if it would make a substantial difference the Rule must give way. *Guaranty Trust Co. of New York* v. *York*, 326 U. S. 99, Statute of Limitations; *Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208, burden of proof; *Palmer* v. *Hoffman*, 318 U. S. 109, contributory negligence; *West* v. *American Tel. & Tel. Co.*,

311 U. S. 223, accrual and termination of cause of action; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, right of corporation to sue; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, commencement of action.

However, in the interest of the uniform procedure which the Federal Rules of Civil Procedure were promulgated to compel, and to prevent a whittling away of that uniformity, he who would challenge the validity and applicability of a particular rule should have the burden of clearly showing that its application would prevent him from obtaining the same substantial treatment that he would obtain in the state court. Moore's Commentary on the U. S. Judicial Code (1949) 307-359; Clark, *Procedural Aspects of the New State Independence*, 8 Geo. Wash. L. Rev. 1230.

Even if it were deemed that the question here presented is a mixture of substance and procedure, nevertheless it is submitted that the Court below should have given great weight to Rule 17(b) and should have applied it unless there was a clear showing of conflict with the decisional law of California. As demonstrated in argument I-A, *supra*, all available decisional law of California shows uniformity, not conflict.

There is nothing in the statutory law of California to compel a contrary finding. The California tolling statute merely tolls the statute of limitations during the disability of minority—it is silent as to the duration of that disability. It is only by judicial construction that California has held that this disability ceases when an infant is married at age 18 and thereby acquires a capacity to sue in her own name, *Caraway* v. *Burns*, 143 C. A. 2d 327, 299 P. 2d 689 (1956). California has applied Section 25 to its own domiciled infants to determine this question (*Sears* v. *Majors*, 104 C. A. 60, 285 Pac. 321), but it has also clearly declared through its highest court that the question of capacity to

sue should be determined by the law of the party's domicile, *Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955). Thus, there is no conflict between the decisional law and the Rule. Yet, the Court below not only chose to ignore the clear implications of the California decisions, but did so in the face of the mandate of Rule 17(b).

Even assuming, for the sake of argument, that California decisional law is devoid of any guide to the choice of law problem here involved, the Court below should have followed the choice of law rule as embodied in Rule 17(b) rather than ignore it and seek out a rule which other courts "seem" to apply. The method followed by the Court below strikes at the heart and purpose of the Rules, uniformity in the Federal Courts.

## II.

**The Court below conflicted with decisions of this Court and with decisions of the local courts in barring the action of the infant daughter herein.**

The Court below dismissed the action on behalf of the infant daughter herein on the ground that under controlling decisional law of California the action is deemed "joint" and if one heir is barred all are barred.

Section 377 of the California Code of Civil Procedure gives the right to bring the action for wrongful death to the "heirs or personal representatives". In 1890, the Supreme Court of California, in *Hartigan* v. *Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851, construed this Section as giving to the heirs a single, joint, indivisible action and held, therefore, that all the heirs must be joined in the action.

The precise issue involved herein did not come before a California Court until 1930, in *Sears* v. *Majors*, 104 Cal.

App. 60, 285 Pac. 321. In that case an intermediate appellate court of California held that if the widow was time-barred, then her children were also barred. The Court reasoned that, since the action was joint, if one heir could not bring the action, then none could. As authority for its holding the court cited cases and treatises which were not in point, but which merely stood for the general proposition that in a "joint" cause of action, all must be joined and that a defense going to the substance of the cause of action would be good against all joint owners. In 1936, another intermediate appellate court of California had this same question presented to it and it followed the *Sears* case without comment or analysis. *Haro* v. *Southern Pac. R. Co.*, 17 C. A. 2d 594, 62 P. 2d 441.

However, after the decision in the *Sears* case, the California Supreme Court in 1931, in *Bou* *Roos*, 213 Cal. 484, 2 P. 2d 817, held that the mere fact that one of the heirs was barred by reason of contributory negligence did not bar the remaining heir. There was no discussion or mention of the *Sears* case, apparently the parties did not bring this possible conflict in the lower appellate court to the Court's attention. However, the Court cited and quoted from an intermediate appellate court decision in *Bowen* v. *Kirjirian*, 105 Cal. App. 286, 287 Pac. 570, which was decided shortly after the *Sears* case, in 1930, by an appellate court in a different appellate division in California. In this case, the appellate court reasoned that since it had been held to be no bar to other heirs that one of the heirs could not establish any pecuniary loss,[1] the rule should be no different "because of the intervention of some other rule, such as contributory negligence."

---

[1] *Rabe* v. *Western Union Tel. Co.*, 198 Cal. 290, 244 Pac. 1077 (1926), this case also held that the complaint could be amended to bring in omitted heirs even after the statute of limitations had run, id. at pp. 298-300.

The *Bowen* and *Bowler* cases were cited with approval by the California Supreme Court in a subsequent case in 1952, *Flores* v. *Brown*, 39 Cal. 2d 622, 248 P. 2d 922. Then, in 1956, the question again arose in *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956). In that case the appellate court did not content itself with merely citing the *Bowen* and *Bowler* cases, but discussed the problem anew (at p. 543):

> "When it is said that an action for wrongful death is *joint* it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is *single* it is meant that only one action for the wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that the action is *indivisible* it is meant that there cannot be a series of suits by heirs against the tort feasor for their individual damages. But while a 'lump sum' verdict is required, the total recovery is the aggregate of the pecuniary loss of each of the heirs entitled to recover by reason of the death of the deceased—the damages of each are added to produce the total (Estate of Riccomi, 185 Cal. 458, 461 [197 P. 97, 14 A. L. R. 509]) . . ." (Emphasis the court's.)

Thus, it clearly appears that the concept and effect of a "joint" cause of action as applied in the *Sears* and *Haro* cases has been completely abandoned and would no longer be applied and should not have been applied in the instant case.[8] Surely, if contributory negligence, which bars the right itself, does not bar the rights of the other heirs, then a

[8] It is clear that California considers the joint nature of the action as procedural, intended to prevent a harassment of the defendant by multiplicity of suits. Thus, it has been held that

time bar, which California considers procedural and merely barring the remedy, should not bar the other heirs (see, *Wohlgemuth* v. *Meyer*, 193 C. A. 2d 326, 293 P. 2d 816 (1956)).

It is submitted that the instant case represents the converse of the situation in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), where it was conceded that there was no developing line of authorities in Vermont courts to cast doubt on the decisions in point. Here, to paraphrase the language of Mr. Justice Douglas in the *Bernhardt* case (at p. 205), there is a developing line of authorities that casts a shadow over the established ones, there are dicta, doubts and ambiguities in the opinions of the Calfiornia judges on the question. In fact, in the instant case, the *Haro* and *Sears* cases cannot be considered "established authorities". Rather, these cases appear to be anomalies; the main stream of California law is represented by the *Bowen, Bowler, Flores* and *Perkins* cases.

The Court below conflicted with decisions of this Court when it stated with reference to these cases, "It is not for us to say whether the two lines of cases are logically reconcilable." *Meridith* v. *Winter Haven*, 320 U. S. 228 (1943); *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223 (1940). And see, Kurland, *Justice Frankfurter and the Erie Doctrine*, 67 Yale L. J. 187, 204-214. On the contrary, it was for the Court below to say whether these cases were logically reconcilable, and if they were not, to choose that line of reasoning which it felt the highest court of California would follow today. And on this question, it is submitted, the

---

defendant must make timely objection as to nonjoinder, *Salmon* v. *Rathjens*, 152 Cal. 290, 92 Pac. 733. In that case, the Court pointed out that defendant was not prejudiced if all heirs were not joined, since the judgment in that action would be a bar to any subsequent suits by other heirs. Applying the same reasoning to the instant case the defendant herein could not be prejudiced since all possible heirs of the decedent have joined in this action.

rationale of the more recent cases, which are bottomed on a decision of the highest court in the *Bowler* case, clearly indicates that the highest court of California would not follow the intermediate appellate court decisions in the *Sears* and *Haro* cases.

## III.

**Section 13 of the New York Civil Practice Act has been so construed and applied herein by the Court below as to violate petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution.**

The Court below has construed and applied Section 13 of the Civil Practice Act in such a way as to deprive petitioners of reasonable access to the Courts of New York based upon their noncitizenship.

The Court below refused to apply the domicile rule although clearly adopted by the California Courts, on the ground that: "When the California Legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same . . . " Thus, it is clearly apparent that the Court below based the application of Section 13 on a domicile or citizenship basis. This is exactly what the Court of Appeals, in upholding the constitutionality of Section 13, stated should not be done. *Klotz* v. *Angle*, 220 N. Y. 347 (1917). The Court below held, in effect, that New York, in "borrowing" California law, could and would find that California Courts could and would discriminate against noncitizens, that California, even if it would apply the *lex loci domicilii* when its own citizens were involved would apply some other rule when noncitizens were involved. This is plainly a violation of the privileges and

immunities clause of the Constitution. *Travis* v. *Yale and Towne M/g. Co.*, 252 U. S. 60 (1920).

It is well settled that among the privileges and immunities guaranteed to a citizen under Article IV, §2, of the Constitution is a right of reasonable access to the Courts of a state, at least to the extent that it is allowed to its own citizens. *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 148 (1907); *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233 (1934); *Miles* v. *Illinois C. R. Co.*, 315 U. S. 698, 704 (1942).

Although a reasonable discrimination by the courts of a state against nonresidents does not violate the privileges and immunities clause, the courts must at least give the nonresident reasonable and adequate access to its courts for the enforcing of any rights he may have. *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553 (1920). In the last cited case, this Court passed upon a "borrowing" statute similar to Section 13. In that case, this Court found that even applying the borrowed limitation period, the plaintiff had at least a year in which to sue in the forum state. The question of infancy was not involved and, presumably, plaintiff had complete access in his own name for that period.

In the instant case, however, petitioners were still considered infants when barred, both under the law of their domicile, South Carolina, and the law of the forum, New York.[9] Under the laws of New York, these infants had no capacity to sue or be sued, except through a Guardian *ad Litem*.[10] The tolling of statute of limitations during in-

[9] South Carolina Code, Vol. 1, §10-104(1); New York Civil Practice Act, §60. It has not been disputed that if petitioners had been domiciled in New York the action herein would have been timely. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (C. A. 2d, 1949).

[10] New York Civil Practice Act, §236.

fancy is almost universally applied in this country, and is premised upon the self-evident fact that an infant has not reached sufficient physical and mental maturity to be capable of adequately understanding his rights or protecting them. It is no answer to point out, as the Court below did, that petitioners could have sued through a Guardian *ad Litem* before they reached majority (New York Civil Practice Act, §§201-06). This begs the issue. The point is that even this provision is intended to afford the infants further protection; this is a shield, not a sword to be used against them. This is given to an infant as an alternative, to be used *if* the infant becomes aware, or is apprised, of his rights and chooses to exercise or enforce them before reaching majority. This alternative remedy does not toll the statute of limitations, for the obvious reason that the infant may not become aware of his rights and the limitations to them. As indicated in the *Emery* case, it is most appropriate that the state of domicile determine this matter.

In the instant case, the infant petitioners were barred from the New York Courts even before they became aware of their rights and obtained the appointment of either a representative of the estate or a Guardian *ad Litem*. This is not reasonable access.[11]

[11] See generally, Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L. J. 1323-91, and see particularly, id. at pp. 1379-89

## CONCLUSION

The Court below acknowledged that it was its duty "to blaze the trail of the foreign law that it has been directed to follow". However, in doing so, it ignored the guide lines that this Court set down for the Court below to follow. It applied its own choice of law rule to bar the infant widow in the face of decisional law and the mandate of Rule 17(b) to the contrary, and it then blindly followed two older intermediate court decisions to bar the infant daughter, although there were cases of both the intermediate and highest court clearly indicating that the older cases would no longer be followed. And, in reaching this result, the Court below abridged the petitioners' constitutionally guaranteed privilege of reasonable access to the courts of New York.

## PRAYER

For the foregoing reasons, petitioners pray that the judgment of the Court of Appeals be reversed and that the petitioners be granted such other and further relief as this Court deem proper.

Respectfully submitted,

ROBERT F. NOLAN and MARJORY M. HALL

by

SPEISER, QUINN & O'BRIEN

*Attorneys for Petitioners*

STUART M. SPEISER
EDWARD M. O'BRIEN
ROBERT A. DWYER
HARRY S. WENDER
2026 Eye Street, N.W.
Washington 6, D. C.

*Of Counsel*